

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELAINE SNEED and U.S. POSTAL SERVICE,
POST OFFICE, Oakland, CA

*Docket No. 00-1360; Submitted on the Record;
Issued April 25, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has met her burden of proof to establish that she sustained injuries to her shoulders, right hand, left wrist, neck and back which were caused by factors of her limited-duty assignment.

The Board has duly reviewed the case record in this appeal and finds that this case is not in posture for decision.

On September 25, 1998 appellant, then a 46-year-old distribution clerk, filed a claim for an occupational disease (Form CA-2) alleging that she had pain in her shoulders, right hand, left wrist, neck and back which were aggravated by the duties she performs at work. She attributed the casing of mail as having the most damaging effect on her conditions. Appellant was working a limited-duty assignment in the Nixie Unit since March 12, 1998.

By letter dated February 2, 1999, the Office of Workers' Compensation Programs referred appellant, along with the most current medical reports, a statement of accepted facts and a list of specific questions to Dr. John Lavorgna, a Board-certified orthopedic surgeon. In the January 29, 1999 statement of accepted facts, the Office noted that appellant was off work from September 20 through October 23, 1998. It further noted that appellant had a reported injury of 5 motor vehicle accidents and 19 workers' compensation claims. The Office stated that nine claims were accepted for wrist, hand, shoulders and elbow strains, but were closed for medical treatment. Dates of injury ranged from June 14, 1983 through April 2, 1996. The Office additionally stated that six claims were denied as industrial. Those claims ranged from dates of injury from September 5, 1983 through January 25, 1998. It noted that on January 3, 1996 claims for back, wrist, hand, leg, foot and bilateral carpal tunnel syndrome were denied.

By decision dated May 21, 1999, the Office found the medical evidence of record insufficient to establish that appellant's symptoms were causally related to the events in September 1998. In so doing, the Office accorded greater weight to Dr. Lavorgna's opinion that

the events of September 1998 represented a temporary increase in symptoms of preexisting degenerative disc disease with a return to preexisting status within a relatively short period of time, with no further disability impairment or limitation. Accordingly, the Office found that the evidence did not establish that there was an aggravation of the underlying condition related to the events in September 1998. Appellant disagreed with the decision and requested an oral hearing.

By decision dated December 9, 1999, the Office hearing representative affirmed the Office's May 21, 1999 decision. The hearing representative noted that appellant testified that she had sustained a traumatic injury to her right shoulder on January 13, 1999, which the Office had accepted for a temporary aggravation. Appellant further testified that she had a nonwork-related automobile accident on April 13, 1999, which kept her out of work until June 21, 1999. She additionally stated that she had a recent work injury on August 21, 1999 and injured her neck, back, shoulder and knee, which she filed a claim for. The hearing representative stated that "with regard to the factual background, it is true that the claimant has had a series of previous traumatic work injuries. It is also true that the claimant, while earlier in her career did perform substantial casing duties, has been in a light-duty position for over five years, and has only performed very limited casing since that time. The employing establishment stated that she had cased mail for only 60 hours within the past 10 months. While the claimant's physicians support that her condition is caused by repetitious work involving use of the shoulders, the facts do not establish that she has performed such repetitious activities. The claim was filed in September 1998 and the claimant alleged that the injury occurred at about that time. She had not been performing repetitious activities with the shoulder at work during this time or any time immediately prior to this, and, in fact, it was noted that Dr. Masem indicated that the symptoms were increased with many activities, including activities at home." The hearing representative found that the opinions of appellant's attending physicians (Drs. Masem and Nolan) could not be afforded any great weight as their opinions were based on the fact that appellant was performing duties requiring repetitive shoulder movements, and this was not true.

Section 8123(a) of the Federal Employees' Compensation Act provides that if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹

In this case, the record reflects that appellant was given a limited-duty assignment on March 12, 1998 at the Nixie Unit, with primary duties involving placing or sticking labels on envelopes. Her limitations were: lifting no more than five pounds; sitting three to four hours per day; standing two to three hours per day; grasping four to six hours per day; and reaching above shoulders one to two hours per day. Her modified duties required her to case mail one to two hours per day, intermittently. The employing establishment stated that from December 20, 1997 through September 25, 1998, appellant cased flats for approximately 60 hours. This was on an intermittent basis with no casing more than two hours on any given day. Although the hearing representative properly found that appellant cased mail for only 60 hours in the past 10 months, the hearing representative could not make a "factual" finding on whether appellant was

¹ 5 U.S.C. § 8123(a); *see also Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

performing repetitive activities with her shoulders at work during the time of the September 1998 filing of this claim or any time immediately prior to September 1998. Whether the act of reaching above shoulders one to two hours per day and intermittent casing one to two per day is considered a repetitive activity is a determination which properly rests within the purview of a qualified medical professional.

In this case, the Office referred appellant to Dr. Lavorgna for a second opinion examination. He submitted a February 22, 1999 medical report indicating that appellant had a long history of similar complaints with prolonged light-duty status for at least two years throughout 1997 and 1998, without change in duty status. He indicated that appellant was working eight hours per day, with a five-pound lifting limit as a distribution clerk. He noted that appellant's symptoms were aggravated by casing mail, any lifting, as well as by housework, like laundry, or reaching for objects while at home. He noted that appellant has a prior diagnosis of a tear of the right rotator cuff and recent x-rays of December 3, 1998 of the cervical spine, as well as the lumbar spine, showed degenerative disc disease. Dr. Lavorgna reported his findings on physical as well as neurological examination. He diagnosed degenerative disc disease, cervical and lumbosacral spine per x-rays noted in the record and right rotator cuff tendinitis, without evidence for rotator cuff tear. Dr. Lavorgna opined that appellant's work-related disability and restrictions were the same now as they were before any September 1998 work claim, this being no lifting of more than five pounds; no sitting of more than four hours, standing more than three hours, and walking more than two hours; and no reaching above shoulder more than two hours. Dr. Lavorgna opined that appellant's present physical limitations and disability are due to preexisting factors and are not due to any events of September 1998 in any way. He stated that appellant has residuals from preexisting conditions and the events of September 1998 simply represented a temporary increase in symptoms with a return to preexisting status within a relatively short period of time, with no further increase in disability, impairment or limitation. Dr. Lavorgna further stated that appellant has no evidence of a rotator cuff tear, but simply a rotator cuff tendinitis situation, which can be treated nonoperatively with local injections and strengthening exercises.

In support of her claim, appellant submitted numerous reports from her treating physicians, Board-certified orthopedic surgeons, Dr. Mathias Masen and Dr. Richard A. Nolan, who attributed appellant's ongoing problems with the cervical and lumbar spine and with the right upper extremity as being created by and/or aggravated by her work activities of September 1998. Dr. Masen is treating appellant for her hands and shoulders, and Dr. Nolan is treating appellant for her back.

In a June 14, 1999 report, Dr. Masen noted his physical examination findings of the cervical spine, shoulder, elbow and wrist and diagnosed a repetitive strain injury including: bilateral shoulder impingement syndrome (very significant on the right side); cervical strain; bilateral wrist tendinitis and carpal tunnel syndrome; and bilateral elbow tendinitis. Dr. Masen stated that appellant's examination has been consistent since he first saw her on November 23, 1998. He noted that while appellant had neck pain and stiffness, radiograms of the cervical spine did not reveal either significant disc space narrowing or significant foraminal narrowing which would be consistent with cervical disc disease or a cervical radiculopathy, which might otherwise be a cause of shoulder or upper extremity pain. He stated that appellant

has very consistent reproducible shoulder impingement, mostly on the right side, and worse with rotator cuff loading on the right side as well. Dr. Masen stated that appellant has worked for the employing establishment since 1974 and had right shoulder rotator cuff surgery (performed and cared for on an industrial basis) in 1981. He opined that appellant's present problem probably represents an exacerbation of that injury. Dr. Masen stated that there was no specific traumatic episode in this regard but, rather, cumulative trauma. He noted that repetitive activities at or above the shoulder level, particularly casing mail repetitively for a prolonged period of time, could cause a rotator cuff tendinitis. Dr. Masen further noted that someone who has had a rotator cuff surgery was particularly at risk for this. He stated, as he had previously mentioned in his November 23, 1998 report, that appellant's symptoms were secondary to cumulative trauma due to repetitive manual activity in the course of her employment, specifically, casing mail. In a report of July 26, 1999, Dr. Masen stated that the June 17, 1999 magnetic resonance imaging scan of appellant's right shoulder revealed a tear of the rotator cuff of the right shoulder, with chronic impingement. He noted that appellant had a minor motor vehicle accident. Dr. Masen stated that while such an event might have caused an exacerbation of appellant's underlying shoulder rotator cuff tendinitis and impingement, as well as her cervical strain, it was unlikely that such an event could have torn appellant's rotator cuff. He opined that it was very probable that this occurred due to repetitive activities at or above shoulder level, particularly casing mail repetitively for a long period of time. Dr. Masen stated that a right shoulder arthroscopy and a rotator cuff repair was needed. He noted that appellant has returned to light-duty work (labeling envelopes) and should be able to continue such work so long as reaching and lifting using her upper extremities and casing mail were avoided. Restrictions of no lifting over five pounds and no repetitive manual activity should continue. In a September 14, 1999 report, Dr. Masen reiterated his opinion that appellant's right shoulder rotator cuff tendinitis originated from sustained repetitive manual activities at or above shoulder level. He further opined that appellant's tear of her rotator cuff was sustained during the January 13, 1999 injury when she felt a sharp, sudden, debilitating pain in her right shoulder.

In a December 3, 1998 report, Dr. Nolan revealed a history of appellant's employment noting that appellant had been on modified duty with restrictions which result in appellant sitting at a table labeling envelopes for someone else to stuff at a later time. He stated that appellant engages in this activity for six hours per day with the casing of mail being accomplished for approximately two hours per day. Dr. Nolan provided a history of appellant's work injuries and noted that appellant remains symptomatic regarding her cervicothoracic spine, thoracolumbar spine and right wrist and hand. Physical examination findings were noted along with x-rays of the cervical and lumbar spine. Diagnosis of musculoligamentous strain of the cervical spine, bilateral, right greater than left; musculoligamentous strain of the lumbosacral spine, without radiculitis; L5-S1 degenerative disc disease; tendinitis of the second compartment, right wrist; and rule out carpal tunnel syndrome, right was provided. Dr. Nolan opined that appellant's problems with the cervical and lumbar spine and with the right upper extremity were created by and/or aggravated by her work activities, which required prolonged positioning while doing casing or labeling as well as by doing prolonged sitting or standing activities.

In view of the discrepancies between the opinions of Dr. Lavorgna and Drs. Masem and Nolan, the Board finds that there is a conflict in the medical opinion evidence as to the cause of appellant's current condition and, therefore, the case will be remanded. On remand, the Office

should prepare a statement of accepted facts and refer it, together with appellant and the case record, to an impartial Board-certified specialist in the appropriate field of medicine, to resolve the conflict as to whether appellant's current medical conditions was caused by factors of her federal employment pursuant to 5 U.S.C. § 8123(a). Following this and such further development as the Office deems necessary, a *de novo* decision should be issued on appellant's occupational disease claim.

The December 9, 1999 decision of the Office of Workers' Compensation Programs is hereby vacated and the case is remanded to the Office for further development consistent with this decision of the Board.

Dated, Washington, DC
April 25, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member